App. F. 1X-4

1911
1921

File No. 25-11

Previous References (Leges.)

Serial Nos. notes

Later References

General and Revenue Secretariat.

Serial Nos. notes

28

Part B for August 27

SUBJECT

The question of the introduction of the Hindu Wills Act and the Probate and Administration Act into the State

filed

Ramaswamy Iyengar
15/8/27

G.R.S. 11] 1911

GENERAL AND REVENUE SECRETARIAT.

(leg)

NOTES.

File No. 85

FILE HEADING.

The Hindu Wills Regulation

From

No. Dated Received

Diary No.	Enclos.	Spare Copies.	Serial No.

BRIEF ABSTRACT OF LETTER.

NOTES AND ORDERS.

NOTES—First Sheet.

GPB—30,000—12-8-11

2

SUBJECT No. 15.

The Probate and Administration Act and the Hindu Wills Act.

Mr. C. Krishnamurti, Law Association, Bangalore.

Summary of discussion.—The introduction of the Probate and Administration Act and the Hindu Wills Act is requested.

The member stated that, as some people objected to the introduction of the Hindu Wills Act, he left it entirely to the Government to decide as they considered proper in that matter but that, in regard to the Probate and Administration Act, the necessity was very great as the want of it was felt very frequently in the State. He added that there was no law in the State defining the rights, duties and responsibilities of executors and administrators, though the making of wills was coming into vogue with the Hindus.

Reply of Government.—There are now some important bills before the Legislative Council and it will be about 12 months before they can be passed into law. The bills proposed by the member will be taken up for consideration as early thereafter as practicable.

Subject in order with Mr. bills connected Ltd. Drafts of these bills are ready they have not to be scrutinised.

MD/25
16/6/11 SW(II)

2 If it is considered that legislation is prima facie desirable, the drafts prepared some years ago will be scrutinised.

3 Opinion seems to be on the whole unfavourable to the Extension of the Hindu Wills Act. But the Probate & Administration Act seems to be necessary.

This may be scrutinised & brought up in due course.

22/7/11

19/6/11 SA

G. R. S. 12]
General and Revenue Secretariat.

Judges File No. 28 of 1911

Serial No.

1 If approved the draft will be scrutinised

2nd Dewan) 4/8/11
20/7
SA
20/7/11

2 2nd Councillor's note. —

"This may be scrutinised and brought up in due course"

(Init) H.V.N.
22.7.11

Bombay Act I of 1855 Draft Contains provisions bearing on pt.

6 Subd to Dewan)

12730
26.7.11
2 books

7. Dewan's note

I agree. I should like the Hindu Wills Act to be taken up separately and discussed afresh on its merits. I would also like to see the principle of the Jains Learning Bill brought up in the Madras Legislative Council by the late Sir V. Bhashyam Iyengar and discussed there, incorporated with the Hindu Wills Bill for Mysore.

5-8-11

8. Asst Secy to

7/8/11 9. Please separate the files and submit.
SA 7/8/11 7/8/11

NOTE— Contn. sheet.

GPB—50,000—12-8-10

Serial No.

10. The main bill relating to Wakfs and Administration Bill has been detached. But the note of Mr S. T. Rajagopalachar which relates mostly to Wills is put up herewith Attention is also invited to his remarks regarding the effect of a will on the birth of a posthumous son (30 Mad) Submitted with the volume of the Fort St. George Gazette containing (1) the Gains of learning bill as introduced into the Madras Legislative Council (2) the Select Committee's report thereon with the bill as amended by the Committee and (3) the discussions on the bill by the said Council after it passed through the Select Committee

21-2-25
22/12/24. SM(III)

11. The Hindu Wills Act was primarily Enacted for the benefit of the Hindus living in the so called "Presidency" towns of British India and the Hindus of the old Town Provinces of Bengal. The Structure of the Joint Family System in Bengal - apart from the legal incidents flowing from it - is rather loose and the individual's

NOTE—Contn. sheet.

GPB—50,000—12-8-10

Serial No.

of the Coparcenary therefore Enjoy a
larger right of testamentary disposi
over their property than the Hindus governed by the
Mitakshara School. The influence of
European ideas was ~~also~~ stronger in the
Courts in the Presidency towns than
in the interior and the same result
followed in respect of the testamentary
power of the Hindus living in those towns
The technicalities of English law
in regard to the validity of wills were also
applied fully ~~to the wills of other classes~~
to the wills made by Hindus living in the
localities referred to above. Hence the
appropriateness in applying to the
Hindu Wills Act Secondly the
provisions of the Indian Succession Act
to wills made by other Hindus of those parts
12. But in the interior wills (even
unfamiliar mode of disposing prop
more or less an ~~unknown thing~~ and
it is only recently that they are
growing in popularity among the Hindus
The formalities required for the valid
of the will of a Hindu residing in the
"Mofussil" are of the simplest - it may
even be said that they are 'nil' - and
if the novel provisions of the Indian Succes

NOTE—Contn. sheet

GPB—55,000—27-4-09

Serial No.

Act are applied to them there is no doubt that for some time to come the wills made by the Common folk will, in a large number of instances, be rendered nugatory for want of Compliance with the technical requirements. The Opinions recorded on this point are also generally speaking against legislation in respect of Hindu wills. The Opinion of the G. R. A was not specifically in favour of it. It is therefore a matter for Consideration by Govt whether this piece of legislation need be undertaken at all.

There's not much of this only 2 witnesses Dated 13/March

13. 2. The Hindu Gains of Learning Bill refd to in the Secretary's note supra was drafted by the late Sir V. Bhashyam Aiyangar in the early ninties and was passed by the Madras Legislative Council in 1900 after having been before that body for nearly ten years. But it was vetoed by the Governor in Council (Sir Arthur Havelock I think) and never became law.

14. The object of the Bill was to declare the nature of the property acquired by a Hindu by the aid of his "learning" - Called in Hindu law Vidyadhana

GPB—50,000—12-8-10

G. R. S. 12]
General and Revenue Secretariat.

Kings File No. 25 of 19 11

Serial No.

Elsewhere Considerable uncertainty prevailed then — and to a lesser Extent it Continues now — as to whether such property was to be regarded as the Exclusive Self-acquired property of the Earner or it was to be included in the joint family property. The trend of the Earlier decisions was in favour of the latter view but in more recent Cases the High Courts, following an observation of the Privy Council adopted a more liberal interpretation and held that where the Earning of the Earner was acquired by a Special at the Expense of the family who incurred 'Special' or Extraordinary outlay they it was the acquisitions were to be regarded as joint property but where the Education imparted was of the same kind as was imparted given to the other members of the family and was not Special or Extraordinary having regard to the means or position of the family, Earnings were to be viewed as the self acquisitions of the member Earning the In the latter Case they descend to the Earner's own heirs viz his Sons, widow, daughter and Sons. [Please see the whole subject clearly discussed in the Sir Krishnaswami Iyengar's Speech Appeal

P.T.

NOTE— Contn. sheet.

GPB—50,000—12-8-10

Serial No. 15

From the above account it will be clear that the matters dealt with in the Hindu Gains of Learning Bill are not directly connected with the Hindu Wills Act unless in passing such an Enactment we deliberately extend the testamentary power of a Hindu over his prop and incidentally extend such a power to the "Gains of Learning". But it may be respectfully submitted that this matter should not be mixed up with the Hindu Wills Bill which, as intended to deals primarily with the formalities and requirements of a valid will and certain legal incidents resulting from it. In any case the Gains of Learning Bill affects intestate as well as testamentary succession to property acquired with the aid of "learning" and confers the right to dispose

and the right of the other members to divide such property

Confers also on the Earner the right to dispose of such property absolutely unless

obviously. This can not appropriately be done in a Regulation dealing with Wills

16 It is also not quite clear whether any attempt to legislate on the lines of Sir Bhashyam Ayyangar's Bill will meet with public approval in Mysore. In Madras

NOTE—Contn. sheet.

GPB—50,000—12-8-10

Serial No.

the Bill received a not inconsiderable amount of opposition - Chiefly from the middle class Hindus - and the Madras Govt were Compelled to veto it The measure was no doubt intended as a step towards liberalising the Hindu Law ~~in~~ by freeing property from being unnecessarily fettered and had probably much to recommend it from an Economic point of view. But it may well be doubted whether it would have worked quite Equitably in those numerous Cases where Hindus of ordinary means put themselves to unusual Expense and trouble to provide advanced Education to a promising member of the family in one or other of the learned professions or to fit him for Employment in the Public Service. Nor is it quite clear whether it would have Contributed to the peace of a Hindu home though the avowed object of the Bill was to remove all uncertainty in the law.

17 In Mysore the practice generally is to allow Every member of the house hold his own Earnings though the "Learning" given to him might have been

NOTE—Contn. sheet.

Serial No.

at the Expenses of the family. At the same time every such member fairly regards it as a duty to help the less fortunate members of his family as far as it lies in his power to do so by contributing occasionally to Expenses connected with marriages or by undertaking the cost of Education of a boy and so on. Not infrequently he resigns his share in the ancestral property if any, in favour of the other members. In this way a process of adjustment suited to the changing times is silently going on and it is a question whether any legislation is needed just at present.

28/12/11.

2nd Cr & Dewan.

18. I agree with the views expressed above as a whole.

The subjects may be taken separately. The Probate & Admrs Act may be taken up first. It is possible to draft a regulation about wills more satisfactorily than by follow

This is ready and is under separate Submission.

9/1/12

NOTE—Contn. sheet.

GPB—50,000—12-8-10

Serial No.

ing the British Act closely. At present I do not think there is any need for a Fatins of leaving bill unless we mean to Codify the Hindu Law of Property generally. In fact I am of opinion that it would be singularly inappropriate to take up this subject.

6/1/12

14626
30.1.12

Yes, let the Steps be taken up separately dealt with. Let the Wills Act be taken up on the lines that Mr Saunders has in view. This a serious thing & alone more verbal wills be permitted as it is now possible to do.

8/1/12 Hz
8/1/12 SH
9/1/12

2/3
14/6
SH
14/6/12

Let us further orders. Perhaps the passing of the Probate & Administration Bill may be awaited

14/6/12 SW (1)
18/6

NOTE—Contn. sheet.

GPB—55,000—17.4.12

G. R. S. 12]
General and Revenue
Secretariat.

File No. 25 of 1901

Serial No.

Instructions of the Committee will have to be obtained. Please submit on the return of the D.C. from Alipore.

22/6/12

Submitted.
(58) SW(11)
6/7/12 8/7/12

Please see minute a week or ten days hence as I am busy having Registers written up.

Books quoted:
Maxwell Reports XVII
Hira v. Nobee, Kumar
Succession Act 1865

12/7/12

Submitted
(58) SW(11)
2/8/12

Ordered to be submitted after the [illegible] bills now pending before the Legislative are disposed of.

NOTE—Contn. sheet.

GPB—55,000—27-4-09

G. R. S. 12]

General and Revenue Secretariat.

Legs File No. 25 of 1911

Serial No.	
	This is an old file of the Legislative Department lying unrecorded.
	The question of having a Regulation in Nepal on the lines of the Hindu Wills Act has not apparently been pursued, & there has been no demand for it in recent years.
	The file is submitted for perusal, after which it will be got recorded.

NOTE--Contn. sheet.

GPB—20,000—20-1-12

(1)

Draft of

A Regulation to regulate the Wills of Hindus, Jains, Sikhs and Buddhists in the territories of H. H. the Maharaja of Mysore

Preamble

Whereas it is expedient to provide rules for the execution, attestation, revocation, revival, interpretation and probate of the Wills of Hindus, Jains, Sikhs and Buddhists in the territories of Mysore; His Highness the Maharaja is pleased to enact as follows:—

Short Title and Commencement

1. This Regulation may be called "The Hindu Wills Regulation, ~~1905~~" and shall come into force ~~from the~~ on the first day of ~~the~~ ~~publication in the Gazette~~ One thousand nine hundred and —

Certain provisions of Act X of 1865 as extended to Mysore made applicable to Wills of Hindus, Jains, Sikhs ~~and Buddhists~~

2. The following portions of the Indian Succession Act, 1865, as extended to Mysore ~~by~~ for the Government of India Notification Foreign Department No 203 G dated 3rd July 1868, namely:—

Section

Sections 46, 48, 49, 50, 51, 55 and 57 to 77 (both inclusive), Sections 82, 83, 85, 88 to 103 (both inclusive) Sections 166 to 177 (both inclusive) and Section 187,

shall, notwithstanding anything contained in section 331 of the said Act, apply —

Extent of Act. (a) to all wills and Codicils made by any Hindu, Jain, Sikh or Buddhist on or after the first day of — one thousand Nine hundred and — within the territories of Jaipore; and

(b) to all such wills and Codicils made outside the territories of Jaipore so far as relates to immoveable property situated within the said territories.

Provisos 3 Provided that married shall not revoke any oneil will or Codicil;

And that nothing herein contained shall authorise a testator to bequeath property which he could not have alienated inter vivos or to deprive any person of any right of maintenance or

but for section 8 of this Regulation, he could not deprive them by will:

And that nothing herein contained shall affect any law of adoption or intestate succession:

And that nothing herein contained shall authorise any Hindu, Jain, Sikh or Buddhist to create in property any interest which he could not have created before the first day of — one thousand nine hundred and — .

Saving of rights of Administrator General

4. Nothing contained in this Regulation shall affect the rights, duties and privileges of the Administrator General of Madras.

Interpretation clause

5 In this Regulation and in the said sections the Indian Succession Act as extended to Mysore, all words defined in section 3 of the said Act shall, unless there be something repugnant in the subject or context be deemed to have the same meaning as the said sec-

has attached to such words respectively:

And in applying sections 62, 63, 52, 56, 58, 55, 101, 102 and 103 of the said Succession Act to wills and codicils made under this Regulation, the words "son," "sons," "child," and "children" shall be deemed to include an adopted child; and the word "grand children" shall be deemed to include the children, whether adopted or natural-born, of a child whether adopted or natural-born; and the expression daughter-in-law shall be deemed to include the wife of an adopted son.

6

Draft of

A Regulation to regulate the Wills of Hindus, Jains, Sikha and Buddhists in the territories of H.H.the Maharaja of Mysore

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Premable. Whereas it is expedient to provide rules for the execution, attestation, revocation, revival, interpretation and probate of the Wills of Hindus, Jains, Sikhs and Buddhists in the territories of Mysore; His Highness the Maharaja is pleased to enact as follows: -

Short title and commence-ment. 1. This Regulation may be called "The Hindu Wills Regulation, 19—" and shall come into force on the first day of one thousand Nine hundred and

Certain provisions of Act X of 1865 as ~~extended~~ to Mysore made applicable to Wills of Hindus, Jains Sikhs and Buddhists. 2. The following portions of the Indian Succession Act, 1865, as extended to Mysore by Government of India N otification Foreign Department No.203 Judl: dated

dated 23rd July 1868, namely, sections 46,48,49,50,51,55 and 57 to 77 (both inclusive) sections 82, 83,85,88 to 103 (both inclusive) sections 106 to 117 (both inclusive) and section 187., shall, notwithstanding anything contained in section 331 of the said Act, apply

Extent of Act.

(a) to all Wills and Codicils, made by any Hindu, Jain, Sikh or Buddhist on or after the first day of one thousand Nine hundred and ..... within the territories of Mysore; and

(b) to all such Wills and Codicils made outside the territories of Mysore so far as relates immoveable property situated within the said teritories.

3. Provided that marriage shall

Provisos.

not revoke any such will or codicil;

And that nothing herein contained shall authorize a testator to bequeath property which he could not have alienated inter vivos or to deprive any person of any right of maintenance of which

but

but for section 2 of this Regulation, he could not deprive them by will;

And that nothing herein contained shall affect any law of adoption or in-testate succession:

And that nothing herein contained shall authorize any Hindu, Jain, Sikh or Buddhist to create in property any interest which he could not have created before the first day of one thousand nine hundred and

Saving of rights of Administrator General.

4. Nothing contained in this Regulation shall affect the rights, duties and privileges of the Administrator General of Madras.

Interpretation clause.

5. In this Regulation and in the said sections of the Indian succession Act as extended to Mysore, all words defined in section 3 of the said Act -- shall, unless there be something repugnant in the subject or context, be deemed to have the same meaning as the said section

section 3 has attached to such words respectively:

And in applying sections 62,63,92,96 98,99,101,102 and 103 of the said succession Act to wills and codicils made under this Regulation, the words "son", "sons", "child", and "children", shall be deemed to include an adopted child; and the words "grandchildren" shall be deemed to include the children, whether adopted or natural-born, of a child whether adopted or natural born; and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son.

M E M O R A N D U M

The question of the introduction of the Hindu Wills Act (XXI of 1870) and the Probate and Administration Act (V of 1881), having been raised in the meeting of the Representative Assembly last year (vide Subject No. 4 of 06), was referred to the Judges of the Chief Court for remarks. On the receipt of their opinions, the Secretary ordered that a Draft Regulation might be prepared "on the lines indicated by the Judges". The Judges have expressed different opinions. The Chief Judge recommends a Draft Regulation based on the Hindu Wills Act and the Probate and Administration Act. Mr. Justice Nanjundayya while of opinion that a codified law on the subject is not called for, having regard to the conditions of Mysore, is in favour of a general enactment embodying the law about wills and probate and administration. Mr. Justice Krishna Rao is opposed to the introduction of the Hindu Wills Act, but has no objection to a Regulation on the lines of the Probate and Administration Act being passed. The difference of opinion, thus centres round the necessity for introducing or following the rules laid down in the Hindu Wills Act. Though Wills are gradually coming into use everywhere in India

they are more familiar to wealthy and flourishing communities among whom the ties of the Hindu joint family system have become somewhat loose. The rules regarding execution etc of wills, which may be safely laid down with regard to such communities living in or near large town, are hardly suited to the majority of the people of in the Province. It seems inadvisable to apply the rather elaborate provisions of the Hindu Wills Act to them. In this view, the Draft Regulation follows the opinion of Mr. Justice Krishna Rao in preference to the views of the other Judges. I propose to state briefly the reasons for adopting the course suggested by Mr. Justice Krishna Rao.

2. The present law in Mysore regarding wills is substantially the same as in the mofussil districts of Madras or Bombay. except as regards obtaining probate of wills. The Hindu Wills Act applies only to the Presidency towns and the province of Lower Bengal. In the mofussil districts of Madras or Bombay, wills are governed by the ordinary Hindu law. So it is in Mysore.

In 18, Mysore Law Reports, pp 23, the Judges say "Although the Hindu Wills Act (XXI of 1870) is not in force in Mysore, yet the courts in Mysore have invariably upheld wills in those cases in which they were in comformity with the provisions of Hindu Law". In Mysore the law as regards Hindu Wills may be taken to be identical with the law in British India as embodied in the judicial decisions of the various High Courts in India. It may not perhaps be superfluous to indicate the main provisions of the Hindu law as applicable to wills, as it may be of assistance in ascertaining the exact nature of the changes that the introduction of the Hindu Wills Act will make in the present law. These provisions may be briefly summarised as follows:-

(1) No formalities such as signature or attestation, are necessary in executing wills - even oral wills can be made - 12 M.I.A.p 1.

(2) As regards prcperty to be bequeathed, a person can bequeath by wills what he can alienate inter vivos.

(3) In order to take under a will, a person must be in existence, either in fact or in the contemplation of law, at the time of the testator's death. Tagore V Tagore (9 B.L.R. pp 377).

12

(4) A Hindu cannot by gift or will create a new estate unknown to Hindu Law or impose conditions repugnant to Hindu Law or make property inheritable otherwise than as that law directs. Tagore V Tagore

(5) The rule against perpetuities does not apply to the case of religious endowments or bona fide gifts in favour of idols.

3. It is clear that this is nothing more than an application by Courts of Justice, of the substantive provisions of Hindu Law to the case of the Wills of the Hindus. As Mr. Justice Henderson says "It being authoritatively laid down that the extent of the testamentary power among Hindus must be regulated by the Hindu Law or by principles to be deduced from that law, it follows that the law of wills among Hindus is virtually an application of the Hindu Law of Succession to testamentary dispositions." Law of Testamentary Devise in India pp43. This being the case, there seems to be no advantage in codifying some of the substantive provisions of Hindu Law, as regards wills alone. Such a thing has not been attempted in connection with other portions of the law of the Hindus and it is of doubtful utility to try to bring within the four corners of a legal enactment all the provisions which are applicable to Hindu wills.

The present law of wills is mostly judge-made law and has been evolved from the general principles of Hindu law relating to succession and gifts. In this view, it seems also premature to codify the existing law which is still in the process of development to meetthe changing conditions of modern Hindu Society. Nor are the provisions regarding the construction and revocation of wills so peculiar as to necessitate their immediate codification. The general law as to construction of documents is also applicable to wills with some reservations, such as, that in the case of wills, greater importance must be attached to the intentions of the testator, which must be carried out as far as possible. (vide sc 74, Indian succn Act). It would seem, therefore, that Mr. Justice Nanjundayya's proposal to lay down the law relating to Hindu Wills, is not attended with any great advantage.

4. I come next to Mr. Justice Moore's suggestion to draft a Regulation on the basis of the Hindu Wills Act. As has been pointed out already, this Act applies only to the towns of Madras and Bombay and the Province of Lower Bengal. An attempt was made in 1881 to enact a general law on the subject by extending the Hindu Wills Act to the whole of India but the consensus of opinion

was opposed to the intrcduction of the rigid rules of the Hindu Wills Act to all parts of the ccuntry. The need for such a law is, if anything, less pronounced in this province where the power of testamentary disposition is but imperfectly recognised and not very often availed of. An examination of the Myscre Law Reports reveals the fact that cases relating to wills are few and far between. It is not perhaps too much to say that the gist of Hindu Wills Act (as amended by the Probate and Administration Act of 1881) is contained in the provisions relating to the execution of wills. While the present law requires no formalities in drawing up a will, the Hindu Wills Act requires (1) signature by the testator or by some other person in his presence and by his direction (2) signatureto be so placed as to indicate that the intention was to give effect to the writing as a will (3) attestation by two or more witnesses each of whom must have seen the testator sign or must have received an acknowledgment of the signature (vide sc 50 of the Indian Succession Act). The introduction of these stringent rules does not seem warranted by the ecomomic or the social condition of the people in Mysore. In the nterior of the Province, such rules would appear to be

15

unnecessary and might work hardship. It seems advisable therefore, following Mr. Justice Krishna Rao's opinion to content ourselves with enacting a Regulation on the lines of the Probate and Administration Act. This course will make the law in Mysore conform to the law in the neighbouring provinces of Madras and Bombay. The enactment of such a Regulation may, owing to the facilities which it will afford for proving wills and for the due administration of the property bequeathed, in course of time make testamentary disposition more popular and it willthen be time enough to attempt legislation in the direction proposed by the Chief Judge.

5. The case for a Probate and Administration Regulation stands on a different footing. Wills are slowly coming into use and it is necessary to provide facilities for proving them easily. As the law stands at present, an executor under a will has no locus standi as such; he is only a manager. He does not possess the representative status acquired on obtaining probate. The genuineness of the will can only be established in a regular suit; or the executor must have recourse to the round-about expedient of getting a certificate under the

As Mr. Justice Narayanday points out, the Indian Succession Act has a very limited operation in Mysore, not even Native Christians being bound by it.

in cases to which the Indian Succession Act as extended to Mysore does not apply,

16

Succession Certificate Regulation. And even then, the judgment will not bind persons who have not been made parties. Probate on the other hand, operates as a judgment in rem and will enable the executor to do all acts necessary for the carrying out of the testators intentions. Again at present, there is no guarantee that the executor discharges his duties properly. In case of his making default in the performance of his duties he can now be brought to book only by a regular suit at the instance of the injured parties. The granting of a Probate of a will will remove this difficulty as the executor will then be bound to submit to the Court, an inventory of the properties and a detailed account later on. Similar remarks apply to the case of intestate successions, and granting letters of administration will prove useful to relatives and creditors of deceased persons. The Draft Regulation put up based on the Probate and Administration Act of 1881, is intended to provide for the deficiencies in the existing law of Mysore in the directions referred to above.

A R Rajagopalacha
Regd. Asst. Comr.